No. 13,840

IN THE

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY,
a corporation,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

JAMES A. KENYON, ADAMS SERVICE CO.,
a corporation, F. NORMAN PHELPS
and ALICE PHELPS,

Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

REPLY BRIEF FOR APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS.

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*Counsel for all appellants, being of the opinion that no reply brief in behalf of Capitol Chevrolet Company is called for, are not submitting a reply brief in behalf of that appellant.

I. THE DISTRICT COURT IGNORED FUNDAMENTAL PRINCIPLES OF DUE PROCESS OF LAW TO HOLD THESE APPELLANTS BOUND BY EVIDENCE WHICH WAS NOT OFFERED AND COULD NOT HAVE BEEN OFFERED AGAINST THEM.

In appellants' opening brief it was asserted that there was absolutely no evidence offered or admitted against them showing that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company or incurred any obligation to Lawrence Warehouse Company (Appellants' Op. Br. 16, et seq.). The answering brief of appellee admits that the only evidence on these points was the judgment rendered after the trial of this action in favor of Lawrence Warehouse Company (hereinafter referred to as "Lawrence") against Capitol Chevrolet Company (hereinafter referred to as "Capitol") (Appellee's Br. 42, et seq.). Appellee's brief further admits that this judgment was not pleaded, proved or mentioned during the course of the trial (Appellee's Br. 43). In appellants' opening brief it was demonstrated that this judgment could not be binding upon these appellants for the following separate and independent reasons (Appellants' Op. Br. 25, et seq.):

1. It was not offered or admitted against appellants to show a liability of Capitol to Lawrence.

2. Appellants are not parties to the judgment in favor of Lawrence against Capitol nor are they in privity with Capitol nor did they aid or participate in or have the right to control the defense of the action in which that judgment was rendered.

3. Under the decisions of the Supreme Court of the United States the judgment against Capitol, not being final, cannot be *res judicata* against appellants.

It was asserted in appellants' opening brief that there was no reference during the trial of the cross-claims, including the argument of counsel and the pleadings, to the fact that Lawrence would rely on any judgment it might recover in the future against Capitol to prove its case (Appellants' Op. Br. 23-24). Appellee's brief confesses that this is true and seeks to avoid this argument by asking the question of how one could plead or offer in evidence in a consolidated action a judgment not yet rendered (Appellee's Br. 43). The answer is simple: Counsel need only have stated in the pleadings, at the pre-trial conference, or at the trial that this judgment, if obtained, would be relied on. Appellee further states that the court could take judicial notice of the judgment to be rendered against Capitol. In support of this contention, appellee's brief cites five cases (Appellee's Br. 38). In none of the cases cited by appellee did the court hold that judicial notice could be taken of a judgment as evidence of liability against or as binding upon one who was not a party to the judgment. Diligent search by counsel for appellants has not revealed any case which has so held. The reason for this is obvious. Before any judgment can be held to be evidence or an estoppel against one who is not a party to the judgment, it must be established that such person was in privity with the party to the judgment in the strict sense of the term or that he aided in the prosecution or defense of the action and had the right to participate and control such prosecution or defense.

Hy-Lo Unit & Metal Products Co. v. Remote C. Mfg. Co., 83 F. 2d 345 (9th Cir. 1936).

These questions are matters of pleading and proof. Judicial notice of a judgment in such case cannot be reconciled with the requirements of due process.

Dillard v. McKnight, 34 C.2d 209, 209 P.2d 387 (1949).

Furthermore, appellee's brief wholly ignores the established rule of law that a plaintiff waives its right to rely on a former judgment as an estoppel by failing to plead it or to offer it in evidence.

Wolfsen v. Hathaway, 32 C.2d 632, 638, 198 P.2d 1 (1948).

The Federal Rules of Civil Procedure follow this rule by requiring the pleading of judgments not only as affirmative defenses (Rule 8(c)) but as special matters in either complaint or answer (Rule 9(e)).

In appellants' opening brief it was asserted that appellants are not in privity with Capitol so as to permit that judgment to be used against them (Appellants' Op. Br. 28, et seq.).

Boulter v. Commercial Standard Ins. Co., 175 F.2d 763 (9th Cir. 1949);

Bernhard v. Bank of America, 19 C.2d 807, 122 P. 2d 892 (1942).

Appellee admits that appellants acquired their interests in the assets of Capitol and agreed to indemnify Capitol before the action by Defense Supplies Corporation was commenced and long before judgment was rendered in that action (Appellee's Br. 9, 45-46). Although appellee's brief asserts that appellants are in privity of contract and in privity of estate with Capitol, no cases are cited in sup-

port of the proposition that one who acquires his interest in the estate of a party *prior* to the commencement of an action and who assumes the liabilities of a party *prior* to the commencement of an action is in privity with such party so as to be bound by a judgment against that party. In fact, one case cited by appellee holds, directly to the contrary, that an assignee was bound only because the assignment was made *after* the action was commenced.

Bates v. Berry, 63 Cal. App. 505, 219 Pac. 83 (1923), hearing in Supreme Court denied.

Actually, however, the law as finally established in California and now uniformly followed is that one is bound by a judgment against another only if one's interest is acquired *after* judgment.

Bernhard v. Bank of America, 19 C.2d 807, 811, 122 P.2d 892 (1942).

One case cited by appellee in which a party was held to be bound by a judgment to which it was not a party is *Kruger v. California Highway Indem. Exch.* 201 Cal. 672, 258 Pac. 602 (1927), certiorari denied, 275 U.S. 568. That case is patently distinguishable. It involved a contract of an insurance company pursuant to an ordinance by which the insurance company was required to agree and did agree to be bound by any judgment recovered against the insured by a third person.

In appellants' opening brief it was asserted that there was no evidence showing that these appellants aided in the defense of the action against Capitol or had the right to participate and control the defense of the action against Capitol by Defense Supplies Corporation (Appellants'

Op. Br. 30, et seq.). It is further asserted in appellants' opening brief that in the pleadings and during the course of the trial it was never contended by Lawrence that these appellants had participated in the action by Defense Supplies Corporation (Appellants' Op. Br. 30). Appellee's brief, in effect, admits that these statements are true because nowhere in appellee's brief is any statement or evidence referred to which would show the contrary. It was pointed out in appellants' opening brief that the only trial in which it is asserted by Lawrence that any evidence of Capitol's liability to Lawrence was introduced was at the trial of the claim of Defense Supplies Corporation in which these appellants did not participate (Appellants' Op. Br. 30). This statement has not been controverted in appellee's brief. Finally, appellee not only has cited no case holding that appellants can be bound by a judgment rendered on evidence introduced at a trial in which they did not participate but has not even attempted to distinguish the leading and controlling case to the contrary.

Dillard v. McKnight, 34 C. 2d 209, 209 P.2d 387 (1949).

Appellants asserted in their opening brief that the judgment in favor of Lawrence against Capitol in Action No. 23171 was not final at the time of the trial of Lawrence's claim against these appellants and is not final even today because no express determination and direction, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, were made in regard to that judgment (Appellants' Op. Br. 35, et seq.). Appellee admits that the judgment was not final at the time of trial but seeks to

answer this question first by contending that such determination and direction were made, second by contending that although not final for purposes of appeal, the judgment is nevertheless binding upon these appellants, and thirdly, even though not binding, the judgment is evidence of the liability.

As to the first contention, Rule 54(b) of the Federal Rules of Civil Procedure, reads as follows:

> "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. As amended Dec. 27, 1946, effective March 19, 1948."

In an attempt to say that the required determination and direction were made, appellee refers to the Order for Judgment (Tr. 29, in 13840), wherein the court refers specifically to Action No. 23171 and thereafter refers specifically to a judgment to be rendered in Action No. 30473, and which document is entitled in both actions, No. 23171 and No. 30473. Obviously, this document does not contain the express determination required by Rule 54(b)

in order for a judgment to be final. Appellee's brief then argues that the only order pursuant to Rule 54(b) (Tr. 179 in 13840) applies to the judgment against Capitol and in favor of Lawrence in Action No. 23171. Appellee makes this argument in the face of the facts that that order is entitled *only* in Action No. 30473; that it refers *only* to the "judgment in the above-entitled action" and that this document was signed by the court and bears no indication that it was submitted by any counsel in the action. It is true that this order was entered pursuant to a notice of motion by counsel for these appellants. This motion was not printed in the Transcript of Record in this action but was transmitted to the Court of Appeals. For the convenience of the court the notice of motion is printed as an appendix to this reply brief. Perusal of this notice of motion shows not only that it was entitled *only* in Action No. 30473 and that the order pursuant to Rule 54(b) was requested *only* in regard to the "judgment in the above-entitled action" but that counsel for Lawrence expressly agreed and consented that the court could make such an order "in the above-entitled action." Thus it is apparent that court and counsel were at all times aware of the parties and claims in the two separate actions so that it could not have been through inadvertence that the order and determination pursuant to Rule 54(b) were entered only as to the judgment in Action No. 30473. Conclusive on this point is the fact that the judgment itself meticulously segregates the determinations of the cross-claim "in action numbered 23171" in one paragraph from the determination of the cross-claims "in

action numbered 30473'' in two other paragraphs (R. 132-133 in 13840). Appellee has cited no case since the amendment of Rule 54(b), effective March 19, 1948, holding that a judgment as to less than all the claims is final for purposes of appeal or for any purpose without the express determination and direction required by the Rule. Clearly, the judgment in favor of Lawrence against Capitol in Action No. 23171 is not final, if the Federal Rules of Civil Procedure are to be followed.

To the contention of appellee that a judgment not final for purposes of appeal under Rule 54(b) may nevertheless be final for purposes of *res judicata,* it should be sufficient to point out that the only cases cited by appellee in support of this proposition are not in point because they relate to the situation which existed before the amendment to Rule 54(b), with which we are now concerned. Prior to this amendment, there was considerable conflict in the cases as to when a judgment was final, and it was to eliminate precisely this conflict that Rule 54(b) was amended. (See Notes of Advisory Committee on Amendments to Rules, following 28 U.S.C.A., Rule 54(b)). That Rule 54(b) relates to finality for all purposes and not only purposes of appeal is demonstrated by the concluding sentence of the Rule, which states:

> ''* * * and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.''

How a judgment, which is subject to revision, can be *res judicata* and more binding collaterally than directly has

not been pointed out. In fact it was precisely this contention which the Supreme Court of the United States rejected in *Merriam v. Saalfield,* 241 U.S. 22 (1916).

Appellee then contends that although not an estoppel against appellants, the judgment against Capitol in Action No. 23171 is evidence admissible against appellants. The last sentence above quoted of Rule 54(b) also answers this contention. It would be manifestly unjust to grant any weight, even as evidence, to so ephemeral a determination. The cases of *Lake County v. Massachusetts Bonding & Ins. Co.,* 84 F.2d 115 (5th Cir. 1936), and *Lake County v. Massachusetts Bonding & Insurance Co.,* 75 F. 2d 6 (5th Cir. 1935), cited by appellee, do not support appellee's proposition. Those cases both involve final judgments. It should be pointed out that those cases are further distinguishable from the instant case because they hold that a judgment recovered against an assured by a third party may be presumptive evidence of the amount of the liability in an action by the assured against the surety company. As applied to the instant action appellants have no quarrel with this proposition. Admittedly, a final judgment by Reconstruction Finance Corporation against Lawrence, if a final judgment had been made, would be *prima facie* proof of the amount of Lawrence's liability to Reconstruction Finance Corporation; it would in no way establish appellants' liability to Lawrence. To the tenuous argument that appellants are sureties of Lawrence (Appellee's Br. 51), appellants point out that in an opinion by Chief Judge Denman this court has held that Lawrence's right to recover is as a third-party beneficiary

of the assumption contract which appellants made with Capitol.

Buck v. Kleiber Motor Co., 97 F. 2d 557 (9th Cir. 1938).

In appellants' opening brief it was asserted that the principal question for decision in this action was whether the District Court could ignore fundamental principles of due process of law to hold these appellants bound by evidence which was not offered and could not be offered against them (Appellants' Op. Br. 3). Appellee's brief has pointed to no evidence which was offered against these appellants to prove Capitol's liability to Lawrence and no cases have been cited dispensing with this element of proof in Lawrence's case. Tersely stated, the argument of appellee is that appellants should be held liable to Lawrence because they assumed the liabilities of Capitol although no proof was offered or could have been offered against appellants to show any liability of Capitol to Lawrence. The court is asked to dispense with traditional Anglo-American principles of justice to hold that because of a liability presumed to have been proved in another case to which appellants were not parties, appellants are liable to appellee.

II. THE APPEAL IN ACTION NO. 30473 SHOULD BE REVERSED AND REMANDED WITH DIRECTIONS TO ENTER JUDGMENT FOR APPELLANTS.

The foregoing discussion establishes that appellee failed to produce any evidence against these appellants of the liability of Capitol to Lawrence. In appellants' opening brief it was pointed out that at the trial of the cross-claims appellants introduced evidence that Lawrence was negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation and Reconstruction Finance Corporation (Appellants' Op. Br. 42, et seq.). This evidence consisted of the judgment, findings of fact and conclusions of law rendered in favor of Defense Supplies Corporation against Lawrence, Capitol and V. J. McGrew in Action No. 23171, and the uncontradicted testimony of James A. Kenyon, and Lawrence's admissions that it employed watchmen for the Ice Palace. The testimony relied on in appellee's opening brief to refute this evidence (Appellee's Br. 14-27), was not offered and could not have been offered against these appellants. Appellee inconsistently asserts that it cannot be bound by the judgment, findings and conclusions of law rendered in the trial of the complaint of Defense Supplies Corporation because the District Court did not intend to pass on any of the cross-claims then pending (Appellee's Br. 29), while relying on the evidence adduced at that trial and the opinion of this court and the District Court after that trial to establish Capitol's liability to Lawrence. It is clear, therefore, that on undisputed evidence appellants established a complete defense to the claim of Lawrence.

Conclusive as to the disposition of this action is the fact that there is now a final judgment on the merits dismissing Lawrence's claim against Capitol (R. 131, et seq. in 13840). That judgment recites that evidence was introduced and that the cause was submitted to the court for consideration, and paragraph 3 of that judgment reads as follows:

> "3. That the cross-claims of cross-claimant Lawrence Warehouse Company against Capitol Chevrolet Company, Capitol Chevrolet Co. and J.A.K. Co. in action numbered 30473 be and the same are hereby dismissed, and that Capitol Chevrolet Company, Capitol Chevrolet Co. and J.A.K. Co. do have and recover against cross-claimant Lawrence Warehouse Company their several taxable costs and disbursements in said action in the following amounts:
>
> Capitol Chevrolet Company $.....
> Capitol Chevrolet Co. $.....
> J. A. K. Co. $....."

Rule 41(b) of the Federal Rules of Civil Procedure applies to dismissals after the presentation of evidence. That rule states in part:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

It was asserted (Appellants Op. Br. 24-25) that this judgment now estops Lawrence to assert any liability of Capitol to Lawrence based on the same claim.

Bernhard v. Bank of America, 19 C. 2d 807, 122 P. 2d 892 (1942).

Appellee's brief attempts to dismiss this point without citation of authority or reference to Rule 41(b) by stating that "counsel's technicality appears wholly frivolous" (Appellee's Br. 40). Apparently it is the position of appellee that notwithstanding the express wording of Rule 41(b), reference may be had to some other documents to show that this judgment is not an adjudication on the merits. Such is not the law.

Black v. Rich, 182 F.2d 706 (D.C. Cir. 1950), (a holding on facts analogous to those in the instant case).

American Nat. Bank & Trust Co. v. United States, 142 F. 2d 571 (D.C. Cir. 1944).

In fact this provision was inserted in Rule 41(b) to eliminate any question of the nature of dismissals and to avoid the complications which formerly resulted from reference to other portions of the record.

9 *Cyclopedia of Federal Procedure* (3rd Ed. 1951), Section 29.18, p. 114.

If the dismissal as to Capitol in Action No. 30473 was not intended to be an adjudication on the merits but a dismissal upon some matter in abatement, the form of the judgment could have been corrected by a motion to the trial court after judgment or by an appeal. Neither of these steps was taken.

Appellants believe that the appeal in Action No. 23171 may be dismissed if it is not reversed. Regardless of what disposition is made of the appeal in Action No. 23171, however, and even assuming that appeal is affirmed, appellants submit that the judgment entered against these

appellants in Action No. 30473 must be reversed with directions to enter judgment for appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

Dated, San Francisco, California,
November 25, 1953.

Respectfully submitted,
HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellants
James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

(Appendix Follows.)

Appendix.

Appendix

[Title of District Court and Cause—No. 30473]

NOTICE OF MOTION FOR ORDER PURSUANT TO RULE 54(b).

TO: Lawrence Warehouse Company and W. R. Wallace, Jr., Esq., Maynard Garrison, Esq., John R. Pascoe, Esq., and Messrs. Wallace, Garrison, Norton & Ray:

TAKE NOTICE that on March 3, 1953, at 10:00 o'clock A.M. or as soon thereafter as counsel can be heard, cross-defendants JAMES A. KENYON, F. NORMAN PHELPS and ALICE PHELPS will move the above-styled Court in the United States Courthouse and Post Office Building, Seventh and Mission Streets, San Francisco, California, in the courtroom of the Honorable Louis E. Goodman, for its order *nunc pro tunc* that there is no just reason for delay in entering the Judgment in the above-entitled action dated February 11, 1953, and directing the entry of said Judgment.

In support of said motion said defendants respectfully show that there has been no adjudication of the claims herein of plaintiff, Reconstruction Finance Corporation, against defendant Capitol Chevrolet Co. and against defendant James A. Kenyon.

Said motion will be based on this Notice of Motion, the Memorandum of Points and Authorities attached hereto,

and the records, proceedings and files in the above-entitled action.

Dated: San Francisco, March 2, 1953.

/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK
/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER

Attorneys for cross-defendants James A. Kenyon, F. Norman Phelps and Alice Phelps

Counsel for LAWRENCE WAREHOUSE COMPANY, having received and examined a copy of the above Notice of Motion, now agree and consent that the Court may forthwith make its order *nunc pro tunc* that there is no just reason for delay in entering the Judgment dated February 11, 1953, in the above-entitled action and directing the entry of said judgment.

Dated: March 3, 1953.

/s/ W. R. WALLACE, JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE
/s/ WALLACE, GARRISON, NORTON & RAY

Attorneys for cross-claimant Lawrence Warehouse Company

MEMORANDUM OF POINTS AND AUTHORITIES.

POINT ONE.

When more than one claim for relief is presented in any action the Court may direct the entry of a final judgment upon one or more but less than all the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Rule 54(b), Federal Rules of Civil Procedure.

POINT TWO.

Absent such express determination and such express direction, any judgment or other form of decision which adjudicates less than all the claims is not appealable.

Kam Koon Wan v. E. E. Black, Limited, 182 F.2d 146 (9th Cir. 1950).

POINT THREE.

Such express determination and such express direction may be made *nunc pro tunc.*

Vale v. Bonnett, 191 F. 2d 334 (D.C. Cir. 1951).